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No. 89-387

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT POSS, ET AL., PETITIONERS

v.

MICHAEL HOWARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioners' challenge to a consent decree that was based upon a finding that the plaintiffs had established a prima facie case of racial discrimination and that provided relief, insofar as possible, only to identified victims of racial discrimination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 871 F.2d 1000. The opinion of the district court (Pet. App. 23a-41a) is reported at 671 F. Supp. 756. An earlier opinion of the court of appeals is reported at 782 F.2d 956. Earlier opinions of the district court are reported at 597 F. Supp. 1501 and 1504.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on April 27, 1989. A petition for rehearing was denied on June 2, 1989. Pet. App. 45a-46a. The petition for a writ of certiorari was filed on August 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Plaintiffs, a class of black employees employed at Warner Robins Air Logistics Center (Warner Robins), located near Macon, Georgia, filed this action on October 31, 1975, seeking injunctive and monetary relief to remedy alleged discriminatory promotion practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. In 1976, the district court certified the lawsuit as a class action on behalf of approximately 3,200 black employees.

In 1984, after substantial pre-trial proceedings and extensive discovery, the parties submitted to the district court a proposed consent decree terminating the action. At a fairness hearing held pursuant to Fed. R. Civ. P. 23, the district court received extensive evidence of past discrimination and concluded that plaintiffs had shown a prima facie case of employment discrimination through the use of statistical evidence of disproportionate racial impact. *Howard* v. *McLucas*, 597 F. Supp. 1504, 1513 (M.D. Ga. 1984). According to that evidence, while blacks comprised 14% of the workforce at Warner Robins in 1973, they then held only 3.3% of supervisory positions there. Pet. App. 13a. The record also showed that black employees were employed disproportionately in low level positions and that they remained in those positions longer than white employees. *Ibid*. The evidence showed that black employees were promoted in proportions less than their representation in the workforce or in lower grades of employment at Warner Robins. *Id*. at 4a.

Because candidates for competitive positions at Warner Robins during the period of alleged discrimination (1971-1979) were identified through a skills locator system, candidates were not required to apply for promotions. Pet. App. 3a. A computer automatically considered all minimally

qualified candidates for each vacancy and selected the top candidates based upon various criteria. *Ibid.* Ordinarily, employees were not notified when vacancies occurred or if they were considered but not selected to fill a vacancy. This system made identification of the specific victims of discrimination impossible. *Ibid.*

2. In an effort to settle this lawsuit, which had been in litigation for nine years at that time, the parties fashioned a victim-specific remedy for the alleged discrimination in promotions, and included it in a proposed consent decree. The proposed consent decree provided $3.75 million in backpay to a class consisting of qualified blacks employed at Warner Robins during the 1971-1983 period. Pet. App. 5a. The proposed decree also established a system in which a limited number of anticipated promotions would be filled over a two-year period from a list of qualified black employees who had been employed at Warner Robins and were the most likely victims of discrimination during the 1971-1979 period. *Id.* at 5a-6a & n.5.

Based upon a conservative promotional analysis prepared by plaintiffs, the parties identified 240 promotions most likely to have been lost to class members and identified 38 specific source grades in which discrimination had most likely occurred. Pet. App. 5a.[1] To ensure that this portion of the decree benefited actual victims of discrimination, the parties restricted those persons eligible to receive one of the 240 promotions to employees who began employment at Warner Robins before January 1, 1980. *Id.* at 34a. To further lessen the impact of this aspect of the decree on third

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[1] The 240 promotional opportunities affected by the proposed consent decree constituted a small fraction of the total of 3,600 anticipated vacancies overall and 1,600 projected vacancies in the job classifications from which the 240 promotional opportunities were drawn. Pet. App. 40a.

parties, the proposed consent decree stipulated that the promotions to class members would be made for every other next available vacancy in the specified positions until all the promotional relief had been completed. *Id.* at 5a-6a. Thus, every second vacancy arising in the specified positions would remain available to any qualified candidate. Furthermore, class members promoted under the decree were required to satisfy applicable standards for the position under Federal Civil Service rules, regulations, and qualifications standards. *Id.* at 5a.

3. Petitioners are 137 white employees at Warner Robins who objected to the proposed consent decree and presented their objections at the fairness hearing. *Howard* v. *McLucas*, 597 F. Supp. 1501, 1504 (M.D. Ga. 1984). The district court allowed petitioners' counsel to participate fully at that hearing by presenting evidence and argument and examining witnesses, but the district court denied petitioners' motion to participate as intervenors. Pet. App. 6a. Rejecting petitioners' objections that the relief was overbroad, as well as objections by some class members that the relief did not go far enough, the district court approved the consent decree and entered a final judgment. *Ibid.*

Petitioners appealed from the district court's denial of their motion to intervene, and the court of appeals reversed, ruling that petitioners had a limited right to intervene. *Howard* v. *McLucas*, 782 F.2d 956 (11th Cir. 1986). The court vacated those portions of the consent decree that had not yet been implemented, and remanded the case for further proceedings. *Ibid.*[2] After allowing the petitioners to intervene on a limited basis and permitting further discovery,

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[2] At the time the Eleventh Circuit issued its mandate in *Howard I*, the Air Force had already made 169 of the 240 promotions to class members under the consent decree. Pet. App. 21a.

the district court considered and rejected petitioners' motion to set aside the promotional components of the proposed consent decree, adopted the decree, and entered final judgment. Pet. App. 7a-8a. On appeal, the court of appeals affirmed, upholding the decree against petitioners' claims that it violated their right to equal protection under the Fifth Amendment and exceeded the relief available under Title VII. Pet. App. 10a-20a.[3]

ARGUMENT

1. Petitioners urge this Court to review the question "[w]hether a consent decree which sets aside promotional positions solely for blacks based upon a predicate of a statistically significant underutilization of blacks violates Title VII and the Constitution." Pet. i, 11. This case, however, is not an appropriate vehicle to address that question, for several reasons.

To begin with, the predicate for the entry of the consent decree was not, as petitioners state, simply evidence of "a statistically significant underutilization of blacks." Rather, both the district court and the court of appeals found that the statistical evidence in this record showed that the plaintiffs had established a prima facie case of discrimination, Pet. App. 13a-14a, 27a-29a, of the type that this Court had previously found adequate to support a race-conscious remedy. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 (1977); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976).[4] Second, there is no con-

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[3] The court subsequently denied a petition for rehearing and a suggestion for rehearing en banc. No member of the court asked for a poll on the question whether en banc rehearing was appropriate. Pet. App. 45a.

[4] In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), upon which petitioners rely, the Court found that the record did not

flict among the circuits on the question addressed by the lower courts. The decision below is consistent with the Second Circuit's decision in *Kirkland* v. *New York State Dep't of Corrections*, 711 F.2d 1117, 1130-1131 (1983), cert. denied, 465 U.S. 1005 (1984), and petitioners have cited no court of appeals' decision to the contrary.

Moreover, petitioners mistakenly suggest that the consent decree set aside promotional positions solely on the basis of race. Under that decree, only certain members of the class are eligible to receive affected promotions. While only black employees are eligible for the promotions under the decree, the decree requires that the promotee have been employed at Warner Robins between 1971 and 1979 in a position that was likely to have been affected by discriminatory promotional practices alleged by plaintiffs, and that he is fully qualified for appointment to the position at the time of his promotion. Pet. App. 34a-35a. Thus, while the remedy petitioners challenge was race-conscious, it was not a remedy that made promotions available to persons on the basis of race alone.[5]

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establish a prima facie case of discrimination by the private construction industry in Richmond, much less any discrimination by the city itself. *Id.* at 724. Here, the lower courts found a prima facie record of discrimination by the Air Force. In addition, the lower courts' decisions were handed down in an unusual factual context. Warner Robins's promotional scheme used a skills locator system, in which every employee was automatically considered for every vacancy, rather than an announcement system, under which employees must apply for a promotion. Accordingly, there were no applicants for promotions, and employees were not notified that vacancies existed or that they had been passed over for promotion. There were also no records kept showing the employees who were considered for a specific job promotion. 597 F. Supp. at 1509, 1514.

[5] Thus, this case resembles the relief stage of a case involving a *Teamsters*-style relief hearing, where one must be a member of the affected class to be eligible. See also *Johnson* v. *Transportation*

In suggesting that this Court review the constitutionality of the consent decree as an affirmative action plan, petitioners overlook the fact that the consent decree was not an affirmative action plan but was instead an effort to craft a victim-specific remedy for past discrimination at Warner Robins. Pet. App. 19a. See *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 474 (1986). In this case, as the court of appeals noted, "the district court first held that the promotional relief was not unlawful because it provided a remedy to actual victims of discrimination." Pet. App. 7a.

2. Alternatively, petitioners urge this Court to grant review to consider whether the consent decree was narrowly tailored so as to comport with Title VII and the Constitution. Pet. 21. The record here shows that this contention lacks merit and therefore does not warrant review.

Petitioners assert that the promotional relief in the consent decree was not narrowly tailored because it was not confined to the actual victims of discrimination.[6] Both courts below explained, however, that, given the nature of the Warner Robins promotion system, the decree was designed to afford relief only to actual victims of past discrimination insofar as that was possible under the cir-

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Agency, 480 U.S. 616 (1987) (membership in the disadvantaged class of women was only one of several factors upon which employment decisions would rest under an affirmative action plan).

[6] Although petitioners claim that the court of appeals should have reviewed this question de novo, it properly reviewed the decree for abuse of discretion. See *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 481 (6th Cir. 1985), aff'd *sub nom. Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). In addition, once the prima facie case of discrimination was established, petitioners had the burden of proof to show that the remedy proposed was unconstitutional. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277-278 (1986) (plurality opinion).

cumstances, a finding petitioners were unable to challenge as to a single class member. Pet. App. 19a, 38a. The fact that in these unusual circumstances there necessarily remained some degree of uncertainty as to the identity of the actual victims of past discrimination does not invalidate the decree. See *International Bhd. of Teamsters*, 431 U.S. at 372. The district court was entitled to broad discretion in approving the decree because of its first-hand experience with the parties and its familiarity with the voluminous record upon which they based this settlement.

Petitioners' specific charges against the approval of this consent decree by the courts below also lack merit. Petitioners claim that the district court did not consider race-neutral remedial action as an alternative to the promotional relief adopted. Pet. 22-24. But petitioners did not urge the district court to adopt specific race-neutral alternatives in lieu of the provisions in the consent decree. The district court therefore did not abuse its discretion on this count. Moreover, petitioners overlook the fact that the Air Force used a variety of race-neutral measures at Warner Robins to combat discrimination from 1971 to 1979. The prima facie showing that those race-neutral measures did not prevent discrimination in promotions from occurring suggests that such measures were not a wholly satisfactory remedy for past discrimination. Both courts below rejected the proposals that petitioners urged as a substitute for the promotional portion of the decree on the ground that less intrusive approaches were not workable or would not provide the plaintiffs with full relief within a reasonable time. Pet. App. 16a, 40a-41a. The courts below found that the decree provided a flexible plan of short duration that would have only a relatively diffuse impact on third parties, including petitioners. *Id.* at 18a, 39a-41a.[7] Those fact-bound determina-

[7] For example, the decree set aside only 240 promotions for members of the plaintiff class, which constitutes only [redacted] a small percentage

tions do not warrant further review. Under these circumstances, this case is an inappropriate vehicle to resolve the broad remedial issues that petitioners raise.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of the total number of Warner Robins promotions. Pet. App. 7a, 23a. Once those promotions are made, no others are required. *Id.* at 39a. In the ten months that the decree was in effect, 169 of the 240 promotions were made, and the district court expected that the remaining 71 positions would be filled in much less than one year. *Id.* at 39a & n.2. And of the 137 named intervenors, 43 had been promoted and 56 were not eligible for promotions to the target positions for one reason or another. *Id.* at 8a n.6.

[8] The court of appeals concluded its analysis by acknowledging that the legal grounds on which it based its opinion "may be considered dicta" because its prior decision "arguably foreclosed" petitioners' contention that the plaintiffs had made an inadequate showing of past discrimination. Pet App. 20a.

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